IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 6887 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SURENDRA NANDKISHORE AGARWAL

Versus

STATE OF GUJARAT

Appearance:

MR AD SHAH for Petitioner

MR HL JANI, Learned APP for Respondent No. 1

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 06/12/2000

ORAL JUDGEMENT

Rule. Mr. H.L.Jani, learned APP waives service of rule on behalf of the respondent.

Mr. Jal Unwala, learned advocate is present on behalf of original informant. Heard Mr. A.D.Shah, learned advocate for the petitioner.

1. The petitioner has challenged the order passed by the learned Additional Sessions Judge, Ahmedabad City Sessions Court, Court no.13 on 13.10.2000 in the proceedings of Sessions Case No. 195 of 1998.

That vide impugned order, learned Additional Sessions Judge has rejected the application Exh.261 moved by accused no.1 - (present petitioner) of said Sessions Case No. 195 of 1998 to recall witness Dr. Rupal Nilkanth Vaidhya for further cross-examintion on the grounds stated in the application.

2. That vide impugned order, learned Additional Sessions Judge has observed that if subsequent witness reveal something involving the role of previously examined witness, it cannot be a ground to permit recalling of the said witness for further cross-examination when there is no additional or a fresh evidence coming on record in that regard. It is also observed that witness Dr. Rupal Vaidhya has been thoroughly cross-examined on the aspect of her visit to FSL and thereby, application made by petitioner has no relevance. The learned Additional Sessions Judge has further observed that supply of quetionnaire by PW-20 to PW-26 cannot furnish new ground qua PW-20 as nothing furnished to an expert by such a person once accepted by her, the same does not remain any longer creation of the supplier and becomes the part and parcel of the expert persons for which the expert has been thoroughly and elaborately cross-examined.

3. It would be pertinent to note that in the instant case, PW-20 Dr. Rupal Vaidhya was earlier examined in order to establish the facts stated in the F.I.R. which has culminated into a sessions case against the petitioner. That subsequently one Ms. S.L.Vaya was examined as PW-26. During her examination prosecution attempted to prove the report of lie detection test of accused no.1 and during the examination witness stated that questionnarie forming part of the record at page-31 to 45 was received by the witness Ms. Vaya from the sister of deceased (PW-20 Rupal Vaidhya). That PW-26 Ms. Vaya has further stated that she had called Dr. Rupal Vaidhya and one Ms. Paulomi for pre test interrogation before she called accused on 3.10.1997. That when Dr. Rupal Vaidhya came for her pre test interrogation, the questionnarie mark "C" was provided by her. That the

evidence on record, extract of which is produced by the petitioner, suggests that present petitioner (accused no.1 of the sessions case) was subjected to lie detection test by the Investigating Officer and when Dr. Rupal Vaidhya was examined as a witness, it was not known to the accused that the questionnarie forming part of pages 31 to 45 and mark "C" was provided by Dr. Rupal Vaidhya, on the basis of which lie detection test of the petitioner was carried out. The said fact clearly reveals that on deposition of Dr. Rupal Vaidhya which was previously recorded, no facts were brought on record suggesting that questionnarie was provided by her on the basis of which lie detection test of petitioner/accused no.1 was carried out. It came to record only when PW-26 Dr. Ms. Vaya was examined as a witness. On the said fact, it would be just and proper for accused no.1 to pray to recall the witness PW-20 for further cross-examination in respect of said questinary which was supplied by her to the expert Dr. Ms. Vaya. There is nothing wrong in claiming to recall the said witness PW-20 for further cross-examination on this point.

4. The provisions of Sec.311 of the Code of Criminal Procedure, 1973 confers wide range of discretion on the Court to summon any person as a witness; to examine any person who is in attendance though not summoned or to recall and re-examine any person already examined; if it is essential to the just decision of the case. That the exercise of judicious discretion require that the Court should be cautious to prevent projecting personal opinion on the merit of evidence before conclusion of the trial and shall take the objective view on the basis of material produced on record.

5. In the instant case, it appears that the trial Court has proceeded to decide the application Exh.261 in a hot hurry overlooking the material facts placed on record as summarised hereinabove, and as such, rejection of application Exh.261 not only amounts to violating the statutory right of the accused to cross-examine the prosecution witness on material point but on that count the resulting prejudice to the defence could not be ruled out, and as such, the impugned order is likely to cause failure of justice.

Hence the following operative orders are passed :

The impugned order dated 17.10.2000 passed by learned Additional Sessions Judge, Ahmedabad City Sessions Court, Court no.13, below Exh.261 in the matter of Sessions Case no. 195 of 1998 is

hereby quashed and set aside.

Application made by petitioner / accused no.1 vide Exh.261 to recall PW-20 for further cross-examination is granted. The learned Additional Sessions Judge is directed to issue summons to the said witness and permit cross-examination of the said witnesses on behalf of accused no.1 - present petitioner according to convenience of the calendar of the Court. Rule to that extent is made absolute.

(A.K.Trivedi,J)

(vipul)